
(2023) 10 KL CK 0090

In the High Court Of Kerala

Case No : Regular Second Appeal No. 495 Of 2017

Raiju.T.P

APPELLANT

Vs

Rajesh Pilot Memorial Charitable Society

RESPONDENT

Date of Decision : 17-10-2023

Acts Referred:

Constitution of India, 1950 — Article 133(1)(a)

Code of Civil Procedure, 1908 — Section 100, Order 42 Rule 2

Citation : (2023) 10 KL CK 0090

Hon'ble Judges : A. Badharudeen, J

Bench : Single Bench

Advocate : G.Sreekumar, V.R.Kesava Kaimal

Final Decision : Dismissed

Judgement

A. Badharudeen, J

1. The sole defendant in O.S.No.237 of 2011 on the files of Munsiff Court, Kannur and the appellant in A.S.No.42 of 2014 on the files of Sub Court, Kannur is the appellant in the Second Appeal. He assails decree and judgment dated 30.06.2014 rendered by the Munsiff, Kannur as well as the judgment and decree rendered by the Sub Judge, Kannur.

2. The respondents in this Second Appeal are the plaintiffs in the above Suit.

3. Heard the learned counsel for the appellant as well as the learned counsel for the respondent on admission.

4. Perused the Appeal Memorandum as well as the lower court records.

5. The parties in this appeal shall be referred as the 'plaintiffs' and the 'defendant' for easy reference hereafter.

6. The 1st plaintiff in this case is Rajesh Pilot Memorial Charitable Society (hereinafter referred to as 'the Society' for brevity). The 2nd plaintiff is the

President, 3rd plaintiff is the Secretary, 4th plaintiff is the Treasurer and 5th plaintiff is the Vice President of the Society. The defendant in the Suit is Rajju T.P, who was the first president of the Society.

7. Precisely the case of the plaintiffs is that the plaintiffs and the defendant jointly formed a registered charitable society by name 'Rajesh Pilot Memorial Charitable Society' and the defendant was the president. Plaintiffs 2 to 5 were the Treasurer, Secretary, Joint Secretary and Vice President respectively. The Society started its charitable services after its formation and accordingly, the Society took a building by name 'Swayam Prakash' bearing No.KRN.37/422 of Kannur Municipality, situated at Payyambalam Beach Road, Kannur on 09.12.2008 from Mrs.Lekha Sudheer for monthly rent of Rs.10,000/- after giving Rs.60,000/- as cash security, for starting a school. The payment was effected from the fund of the Society. During payment of rent, the landlord issued receipts in the name of the society and the receipts during the period between May, 2010 to September, 2010 were produced.

8. Plaintiffs' further case is that then the Society started a school under the caption 'Unique Kids' as per the approval given by the governing body of the Society on 23.12.2008 and the name of the school is "Unique Kids English Medium School". The defendant managed the affairs of the school for and on behalf of the society as president. But later the president failed to produce the accounts pertaining to the school and mismanaged the school. Accordingly, on 25.07.2010 the defendant was suspended from the post of president of the Society and later plaintiff Nos.2 to 5 were selected as the new office bearers of the Society. According to the plaintiffs, the defendant had no manner of right over the school and, therefore, the present Suit was filed to declare that the Society is the tenant of the plaint schedule property and the school therein is under the management of the Society. Plaintiffs also sought for a direction to the defendant to hand over the management of the school in the plaint schedule property of the 1st plaintiff with all its records and assets. Prohibitory injunction thereafter from interfering with the functioning of the management of the school was also sought for.

9. The defendant filed detailed written statement and admitted formation of the Society at the instance of the defendant and plaintiffs 2 to 5. But the specific contention raised, as could be read out from paragraphs 9 and 10 of the written statement is as under:

"9. The averment that the society is the tenant of the plaint schedule building and the school which is being functioned therein is under the management of the society that the defendant has no other manner of right over the plaint schedule property and the school therein that the defendant is expelled/removed from the society even before the filing of suit, O.S.No.431/2010, but even now the defendant is managing the affairs of the school illegally that the defendant is now mismanaging the school to see that the school is closed down losing its faith among the parents of the students and public are false statements and hence

denied by this defendant.

10. The plaintiffs have no locus standi to file the suit and the incidental applications. The above said school, Unique kids English Medium School at Payyambalam, Kannur is not functioning under the Rajesh Pilot Memorial Charitable Society and the above said School is not the Unit of the above said society. The plaintiffs have no legal right over the above said School. Even though the defendants and the plaintiffs are the members of the above said Charitable society, the above said school is functioning independently without the control or supervision of the above said society."

10. In paragraph 16 of the written statement, the defendant raised a contention that the school had been functioning under the personal management of the defendant herein. From the date of incorporation and till this date, the school is solely under the management of this defendant as a Proprietary business and the plaintiffs never managed the affairs of the above said school. So the plaintiffs are not entitled to get the relief claimed through the incidental application.

11. The trial court ventured the matter raising appropriate issues. During trial PW1 and PW2 examined and Exts.A1 to A14 were marked on the side of the plaintiffs. DW1 examined and Exts.B1 and B2 were marked on the side of the defendant. Exts.C1 and C2 also were marked.

12. The learned Munsiff addressed the contention raised by the plaintiffs and the defendant and finally decreed the Suit as under:

"In the result, the suit is decreed with costs as follows:

1. It is declared that the first plaintiff Rajesh Pilot Memorial Charitable Society is the tenant in respect of the plaint schedule building and the school run in the said building is under the management of the 1st plaintiff society.

2. The defendant is directed by a mandatory injunction to hand over the management of the school in the plaint schedule building to the plaintiffs with all records and assets.

3. The defendant and his men are restrained by permanent prohibitory injunction from trespassing into plaint schedule property and interfering with the management of the school therein."

13. The defendant challenged the said finding before the Sub Court, Thalassery. The learned Sub Judge also re-appreciated the evidence and concurred with the finding of the trial court.

14. While impeaching the concurrent verdicts of the trial court as well as the appellate court holding the view that Rajesh Pilot Memorial Charitable Society is the tenant of the plaint schedule building and the school is under the management of the Society, the learned counsel for the defendant submitted that as admitted by the parties to the lis, the defendant was the first president of the Society. According to the learned counsel for the defendant, even though the

defendant was removed from the society as its president, the Unique Kids English Medium School functioning in the plaint schedule property is not the one either belonged to or managed by the Society and the same is under the personal management of the defendant and, therefore, the courts below went wrong in granting decree in favour of the plaintiffs.

15. In response to this contention, the learned counsel for the plaintiffs submitted that, in page No.1 of Ext.A2 minutes book the first meeting of the Society could be gathered. The same was convened after its registration on 16.11.2008 and the defendant (Raiju T.P) was the president, who chaired the meeting. Thereafter, 9 meetings were convened and as per the meetings, the school was established and its functioning was administered, but at a meeting held on 28.03.2010, attended by the defendant as the president, the managing committee decided to authorise the vice president to call for the meeting since the president failed to call periodical meetings for a period of 7 months. It is submitted by the learned counsel for the plaintiffs further that on 13.05.2010, another meeting was convened. In the said meeting also, the defendant was present. Thereafter, the defendant was willfully absent from the meetings and the said fact was recorded in the minutes dated 09.06.2010. Thereafter in order to facilitate the functioning of the Society, new office bearers were selected after removing the defendant, who was the president of the Society. According to the learned counsel for the plaintiffs, the removal of the defendant as the president was communicated to the defendant and the defendant did not raise any challenge as to his expulsion. According to the learned counsel for the plaintiffs, at present the affairs of the 1st plaintiff Society have been managed by plaintiffs 2 to 5 and the school is under the management of the Society and the contention raised by the Society that he has been managing the school in his personal capacity as a proprietor, is absolutely false and no evidence, even remotely available in this regard. Therefore, no substantial question of law arises in this appeal to get it admitted to unsettle the concurrent verdicts entered into by the trial court as well as the appellate court after appreciation of evidence.

16. Coming to the crux of this matter, the plaintiffs would contend that 'Unique Kids English Medium School' is one started by the Society and at present plaintiffs 2 to 5 are its office bearers. But the contention of the defendant is that the school is under his personal management as a proprietary concern and the plaintiffs have no manner of right over the school. On perusal of Ext.A2 minutes book, it could be gathered, as rightly pointed out by the learned counsel for the plaintiffs, that the school started functioning under the Society and the defendant held as the president and managed the school. Since the president attempted to appoint staff in his personal capacity without approval of the Society, he was warned in the meeting held on 28.03.2010 as stated in page No.9 of Ext.A2. During cross examination of the defendant, who was examined as DW1, when he was asked about his signatures appeared in page Nos.9 and 11 of Ext.A2 minutes of the meeting held on 28.03.2010, he deposed that he had doubt about his signature. When he was asked about his signature in Ext.A2 in its 4th page

and 5th page, he had given evidence that in page Nos.1 to 12 of Ext.A2 he had written his name as Raiju T.P and put his signature. But he did not write the minutes and it was written by the secretary.

17. PW2 examined in this case is the landlord of the building, where the school has been functioning, and she had given evidence in support of the plaintiffs' case. According to PW2, she had given the plaint schedule building, a house, to the Society and received Rs.60,000/- by cheque from the Society and the Society took the building for rent. According to her, the rent for the building was given till December, 2010 by the Society. According to her, LKG to 1st standard have been providing in the said school. During cross examination, in fact, PW2 corroborated her version on the submission that she had handed over key of the building to the Secretary of the Society and she had familiarity with the defendant. The defendant never approached for the purpose of getting the building.

18. In this matter, the dispute is confined as to whether who had started the school and who are legally empowered to manage the school ? As per the evidence given by PW1 supported by Exts.A1 and A2, it could be gathered that the Society started 'Unique Kids English Medium School' and had been managing the school. Accordingly, the defendant managed the school as the president of the society and he mismanaged the school against the interest of the Society. As per the decision dated 16.10.2010 new office bearers, who are plaintiff Nos.2 to 5, were selected to administer the Society. Going by the evidence of PWs 1, 2 and Ext.A2, it is categorically clear that the school is one established and started by the Society.

19. Ext.A1 in this case is the memorandum of association of the society and Ext.A3 is the notice issued by the society to the defendant seeking possession of the school. Ext.A6 would go to show that the Society is a registered one and the same has been maintaining bank accounts and Ext.A8 series are rent receipts issued in favour of the Society by the landlord (PW2). Ext.A7 passbook would go to show that Rs.60,000/- was given to PW2 as deposit by the Society at the time of possessing the plaint schedule property on rent by the Society, as deposed by PW2. Even the defendant, who was examined as DW1, admitted that he had paid the rent from the account of the Society and not from his pocket. DW1 also admitted that he was the President of the Society. That implies that he is not the president of the Society after selection of plaintiffs 2 to 4 as its office bearers and the 2nd plaintiff is the president of the Society at present. So, all documents placed by the plaintiffs' side along with candid version of PW1 supported by the candid version of the landlord (PW2), it has been categorically established that the school is one established and started by the Society in the tenanted premises and the defendant managed the same as the president of the Society and not in any other capacity.

20. In this case, the contention of the defendant is that he has been acting as manager of the school in his personal capacity as a proprietor. In this regard as I have already pointed out, the only evidence is the oral evidence of the

defendant, who was examined as DW1. The appellant raised contentions based on Ext.B1 before the appellate court. Ext.B1, is a lawyer notice issued by the defendant to PW2 and her husband Sudheer. In the said notice dated 21.09.2010, the defendant raised a contention that the defendant had been conducting the school named 'Unique Kids'. In fact, the said notice issued, which is before filing of the suit as well as another suit at the instance of the defendant himself as O.S.431/2010 seeking injunction against defendants 2 to 5 in their individual capacity, which was later dismissed as not pressed, is of no significance to hold that the plaintiff has been managing the affairs of the School in his personal capacity. It is to be noted that Ext.B5 is an additional representation discussed by the lower courts reading the same as Ext.B1. This document is dated 02.06.2010 for getting trade mark issued by one K.P.Bhagyesh styling himself as the authorised attorney of M/s.LAWYERS' ARCADE, for "M/s.Unique Kids", showing name of the applicant as Mr.Raiju T.P, 'Managing Partner', M/s.Unique Kids. But this document by itself is not sufficient to hold that the defendant has been managing the school in his personal capacity and as per this document, his name is shown as 'Managing Partner', M/s.Unique Kids, with an indication that the school has been functioning under a partnership firm. The way the defendant styled himself as 'Managing Partner' itself is misleading. Even though the defendant raised the contention that he had paid rent for the building as per Ext.B3 series, the same is on behalf of the Society, since the tenancy is one between the 1st plaintiff and PW2.

21. Thus it appears that the defendant miserably failed to prove his contention that he has been managing the school in his personal capacity, by cogent and convincing evidence.

22. According to the learned counsel for the petitioner, the expulsion of the defendant as the president of the Society is illegal. In fact, this contention is no more available to the defendant since he did not challenge his expulsion for the last 13 years, even though he is aware of his expulsion as per decision dated 16.10.2010 taken by the Society, even prior to filing of the present suit and the expulsion is more vivid, when he had instituted O.S.431/2010. Thus challenge against his expulsion is barred by limitation. Hence in this matter it has to be held that no substantial questions of law arise herein to admit and maintain this appeal. In fact, the courts below correctly appreciated and re-appreciated the evidence and granted decree.

23. It is strange to see that the defendant, who was the first president of the society has no case that he has been managing the school for and on behalf of the society as the president of the Society. To the contrary, his contention is that he has been managing the school in his personal capacity. In order to substantiate the said contention apart from his oral evidence, nothing is available.

24. In this case, the learned counsel for the appellant failed to raise any substantial question of law warranting admission of the second appeal. Order XLII Rule 2 provides thus:

"2. Power of Court to direct that the appeal be heard on the question formulated by it.-At the time of making an order under rule 11 of Order XLI for the hearing of a second appeal, the Court shall formulate the substantial question of law as required by section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provision of section 100."

25. Section 100 of the C.P.C. provides that, (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. (2) An Appeal may lie under this section from an appellate decree passed ex parte. (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question. (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Proviso says that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

26. In the decision in [2020 KHC 6507 : AIR 2020 SC 4321 : 2020 (10) SCALE 168], Nazir Mohamed v. J. Kamala and Others reported in the Apex Court held that:

The condition precedent for entertaining and deciding a second appeal being the existence of a substantial question of law, whenever a question is framed by the High Court, the High Court will have to show that the question is one of law and not just a question of facts, it also has to show that the question is a substantial question of law. In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, [(1999) 3 SCC 722], the Apex Court held that:

"After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial question of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where such a question was not formulated at the time of admission either by mistake or by inadvertence."

"It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under S.100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact."

"If the question of law termed as a substantial question stands already decided by a larger Bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal."

When no substantial question of law is formulated, but a Second Appeal is decided by the High Court, the judgment of the High Court is vitiated in law, as held by this Court in *Biswanath Ghosh v. Gobinda Ghose*, AIR 2014 SC 152. Formulation of substantial question of law is mandatory and the mere reference to the ground mentioned in Memorandum of Second Appeal can not satisfy the mandate of S. 100 of the CPC.

27. In a latest decision of the Apex Court reported in [2023 (5) KHC 264 : 2023 (5) KLT 74 SC], *Government of Kerala v. Joseph*, it was held as under:

For an appeal to be maintainable under Section 100, Code of Civil Procedure ('CPC', for brevity) it must fulfill certain well – established requirements. The primary and most important of them all is that the appeal should pose a

substantial question of law. The sort of question that qualifies this criterion has been time and again reiterated by this Court. We may only refer to *Santosh Hazari v. Purushottam Tiwari*, [2001 (3) SCC 179] (three – Judge Bench) wherein this Court observed as follows:

12. The phrase “substantial question of law”, as occurring in the amended S.100 is not defined in the Code. The word substantial, as qualifying “question of law”, means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of “substantial question of law” by suffixing the words “of general importance” as has been done in many other provisions such as S.109 of the Code or Art.133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance.

28. The legal position is no more res-integra on the point that in order to admit and maintain a second appeal under Section 100 of the C.P.C., the Court shall formulate substantial question/s of law, and the said procedure is mandatory. Although the phrase 'substantial question of law' is not defined in the Code, 'substantial question of law' means; of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of “substantial question of law” by suffixing the words “of general importance” as has been done in many other provisions such as S.109 of the Code or Art.133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. As such, second appeal cannot be decided on equitable grounds and the conditions mentioned in Section 100 read with Order XLII Rule 2 of the C.P.C. must be complied to admit and maintain a second appeal.

29. In view of the above fact, no substantial question of law arises in this matter to be decided by admitting this appeal.

In the result, this appeal is found to be meritless and the same is dismissed without being admitted..